MOTION FILED

MAY 17 1994

(2)

NO. 93-1633

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM O. SWAN AND
KATHLEEN R. SWAN,

Petitioners,

v.

KURT S. PETERSON, WARDEN OF WASHINGTON CORRECTION CENTER, ET AL.,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF CHARLES R. NESSON, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION BY CHARLES R. NESSON FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 37.2, Charles R. Nesson respectfully moves this Court for leave to file the accompanying *Amicus Curiae* Brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioner has consented to leave for this purpose. Respondent has not.

NATURE OF *AMICUS'* INTEREST

I am a professor of Evidence at Harvard Law School, co-author of Green and Nesson, *Problems, Cases, and Materials on Evidence* (Little Brown, Boston, 2nd ed. 1994), and the author of various law review articles dealing with the nature

and sufficiency of evidentiary proof.[1] I submit this brief in support of the petition of William and Kathleen Swan.

I became interested in this case after viewing a segment of the CBS television program "Sixty Minutes". Sixty Minutes presented the case as an injustice resulting from over-zealous response to concerns about abuse of children. They described a case in which the Swans, a middle-class suburban couple, lost their child and their freedom solely on the basis of uncorroborated and contradicted hearsay. I pursued the case in the law reports, expecting to find that Sixty Minutes had presented it unfairly by leaving out crucial evidence against the Swans. I found, to the contrary, the most extreme example of erosion of the

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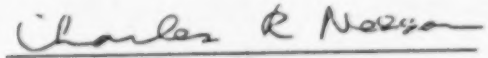
[1]See e.g., Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357 (1985).

Confrontation Clause of which I am aware.

I have no financial interest in this case, nor any personal acquaintance with the Swans. My concern for this case is that of a law teacher who wants the law in his field to be coherent and of a citizen who wants the law of his country to be just. I respectfully ask the Court to consider the following brief addressed to the issues presented by the Swans' petition.

Respectfully submitted,



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BRIEF *AMICUS CURIAE* OF CHARLES R. NESSON IN SUPPORT OF PETITIONERS

INTRODUCTION

This case provides the Court an opportunity to develop a consistent and comprehensive rationale for relating hearsay to the Confrontation Clause. The Court has struggled to give meaning to the Confrontation Clause while still recognizing that hearsay evidence is often useful to fact finders. The law of confrontation and hearsay, however, has become significantly intermeshed and confused. Yet, the integrity and credibility of the judicial process depends upon judges having an effective constitutional standard by which to limit the use of hearsay accusations in criminal trials. Without such a standard, accusations become easy to make and devastatingly impossible to defend, regardless of the truth.

Amicus urges that the right of confrontation be understood as the defendant's right to test the accusation against him. Accusations come in two forms, direct and hearsay. A direct accusation must be subject to testing by cross-examination. A hearsay accusation should be recognized as a form of circumstantial evidence and should be subjected to two separate tests: a foundation test for admissibility, already recognized by this Court in Idaho v. Wright[2], and a corroboration test for sufficiency.

First, in the foundation test for admissibility, the trial judge should analyze the circumstances surrounding the supposed making of the statement and the reliability of the mode of its transmission into court. Was there any

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[2]497 U.S. 805 (1990).

motive to misstate or opportunity for misunderstanding? Is there any reason to doubt the accuracy of the declarant's memory or perception or use of language? Was the declaration elicited or spontaneous? Was the person who supposedly heard the hearsay accusation biased in any way that might have led that person even unconsciously to communicate to the declarant an expectation of the kind of statement that was wanted or to misperceive, misremember, or misreport the statements the declarant actually made? Answers to these questions, and more like them, at the level of admissibility distinguish hearsay worth admitting into evidence from hearsay which is unreliable.

Second, in the corroboration test for sufficiency, the trial judge should ask whether there is sufficient evidence corroborating the hearsay accusation to justify a conclusion beyond reasonable

doubt that the accusation is true. This test recognizes that doubt is implicit in the nature of a hearsay accusation, even one that has passed the initial foundational hurdles to admissibility. Without corroboration, doubt necessarily remains to infect any resulting guilty verdict because the doubt is built into the structure of proof. If the hearsay accusation is not sufficiently corroborated, the trial judge should not permit the case to go to the jury.

This interpretation of the Confrontation Clause would distinguish confrontation from hearsay, leave hearsay law and its mess of exceptions to lower levels of common law elaboration, and reserve for the constitutional realm a more general and elevated principal of

justice to bound the outside limits of common law practice.[3]

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[3]See Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. Rev. 557 (April 1988).

QUESTIONS PRESENTED BY THE SWAN CASE WHICH WILL STRUCTURE A CONSTRUCTIVE RECONCILIATION OF HEARSAY AND CONFRONTATION

1. When determining the reliability of a hearsay accusation pursuant to the Confrontation Clause, should a trial judge consider evidence that contradicts the hearsay accusation?

2. Can a hearsay accusation be considered reliable when the accuser has been judicially determined to be unable to speak the truth or accurately remember the past?

3. When determining the reliability of a hearsay accusation pursuant to the Confrontation Clause, should a trial judge consider the credibility of the hearsay reporter?

4. Does the Confrontation Clause prevent a court from convicting a criminal defendant solely on the basis of hearsay?

STATEMENT AND DISCUSSION OF THE CASE

The Swans are a well-educated, married couple without any prior criminal history. On the basis of hearsay statements of two three-year-old girls, uncorroborated by any physical evidence, they were convicted of statutory rape and sentenced to prison for fifty months.

The hearsay statements -

- accused the Swans of sexual intercourse ("[Daddy] puts his potty in me and it hurts real bad."[4]; "[Bill] puts his peepee -- [points to the vagina]. It hurt."[5]);

- accused the Swans of inserting marbles and candles into the girls' vaginas ("Kathy put something in my potty and made me bleed"[6]; "Kathy put some

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[4]Washington v. Swan, 790 P.2d 610, 616 (Wash. 1990).

[5]Id. at 617.

[6]Id. at 616.

marbles in my bottom"[7]; "Bill and Kathy put a candle in my potty and played happy birthday."[8]);

- accused Kathy Swan of reciprocal cunnilingus ("we kiss Kathy's boobies and we lick her potty, and she does that to us, too."[9]);

- accused Bill Swan of fellatio ("My daddy puts his penis in my mouth and icky milk comes out"[10]; "[Uncle Bill] puts his peepee in my mouth and shakes it around and then he says 'Here is your birthday present' and something icky gets in my mouth."[11]).

If these accusations are true, then the defendants have indeed committed

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[7]Id. at 617.

[8]Id.

[9]Id.

[10]Id. at 616.

[11]Id. at 617.

heinous and reprehensible crimes. But judges, above all, must not let revulsion for the crime of abusing children undermine their vigilance to insure that crimes are fairly proved according to the rules of our Constitution.

In this case there is no real assurance that the children ever made the hearsay accusations attributed to them. The accusations of abuse were reported to the jury by two adult witnesses who worked at a day-care facility the girls attended. The girls, Beth Anne (the Swan's daughter) and her friend Rachel, were unavailable to testify because the trial judge determined, after a hearing, that they were incompetent as witnesses. At the hearing, Beth Anne simply refused to speak to the judge. Rachel spoke freely, saying she had been in the courtroom forty times when she had never been there before, claiming she recognized defense

counsel and had seen him four days before, neither being true, failing to recognize her father or the Swans although they were all present in the courtroom, and saying her dress was "blue, sort of, but it's pink," though the dress was only pink. The trial judge found that Rachel "did not understand the obligation to tell the truth on the witness stand and did not have sufficient memory to speak truly about past events."[12]

Beth Anne's hearsay accusations were elicited from her by a day-care worker, and Rachel's by the director of the day-care center on the following day. The day-care worker, Lisa Conradi, was on her second day of work and was thus a stranger to Beth Anne. She claimed she observed Beth Anne emerge from the bathroom with her dress up, and told her to keep her

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[12]Id. at 627.

private parts covered. She said she then instructed Beth Anne that no one should look at or touch her private parts, and that Beth Anne said in response "Mommy and Daddy do."[13] Conradi said that Beth Anne then described the alleged abuse, and said that Rachel was also involved. Conradi reported her account of Beth Anne's accusations to the director of the day-care center. The director interviewed Rachel the next day and elicited similar accusations from her.

Several circumstances surrounding the making of these accusations bear on their reliability. First, the evidence of these statements is entirely dependent on the credibility of the day-care worker and director, including the making of the statements, their wording and tone, the degree of leading and suggestion employed

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[13]Swan v. Peterson, 6 F.3d 1373, 1377 (9th Cir. 1993).

-- in short, the totality of the circumstances surrounding the supposed making of the statements. No tape recording was made of either girl's supposed statements, and no third party was present.

Second, the day-care staff had previously put pressure on Beth Anne to change her sexual behavior, which would naturally have made Beth Anne defensive when approached by a new member of the staff who scolded her about having her dress up and exposing her private parts. The director of the day-care center had previously been upset by Beth Anne's sexual behavior. The director testified that Beth Anne masturbated constantly and that the day-care staff "had to repeatedly tell Beth Anne to keep her hands out of her pants."[14] The director clearly

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[14] Id. at 621.

considered this masturbatory behavior inappropriate and in need of repression.

Third, Conradi, the day-care worker who reported Beth Anne's statements, was sensitive to the possibility of child abuse to a degree suggesting phobia. She claimed to have been abused as a child herself, claimed her own two children were victims of abuse, and asserted that child abuse is "everywhere".[15] In a post trial interview, Conradi noted that she had turned in over 20 cases of child abuse.[16]

Fourth, Conradi repeated her account of lurid child abuse to the day-care director before the director interviewed Rachel. The director, who was not experienced in neutral questioning, then

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[15]Citations to the Magistrate's Report and Recommendation are to Appendix A of Petitioners' brief. Magistrate's Report and Recommendation, Brief for Petitioners at App. A - 27-28.

[16]Swan v. Peterson, 6 F.3d 1373, 1384 (9th Cir. 1993).

interviewed Rachel, alone, in her office -- Rachel, whom the trial judge found to be suggestible and incompetent because she did not remember accurately and did not appreciate the obligation to tell the truth.[17]

Finally, the hearsay statements were not corroborated by any physical evidence. Indeed, to the extent possible given the nature of the accusations, they were contradicted. Had the accusations been true of insertion of penis, marbles, and candles into the vaginas of three-year-olds, allegedly resulting in bleeding, there would surely have been physical harm. Yet, there was none. As to Rachel, the Washington Supreme Court's opinion states flatly: "There was no medical

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[17]Moreover, the director wept while questioning Rachel but nonetheless continued the interview. Swan v. Peterson, 6 F.3d 1373, 1381 n.6 (9th Cir. 1993).

evidence to document Rachel's claims of abuse. A physician examined her on October 5, 1985 and found no signs of physical trauma."[18] As to Beth Anne, the Swan's family physician examined her and found "no evidence of physical injury to her genitalia."[19] The doctor failed to note whether Beth Anne's hymen was intact, but an examination subsequent to trial revealed that Beth Anne's hymen is intact.[20]

The hearsay accusations were admitted into evidence pursuant to Washington's child victim hearsay statute, which provides that hearsay statements of a child which are not otherwise admissible under a traditional hearsay exception

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[18]Id. at 624.

[19]Swan v. Peterson, 6 F.3d 1373,1385 (9th Cir. 1993).

[20]Magistrate's Report and Recommendation, Brief for Petitioners at App. A - 30-31.

shall be admitted if the time, content and circumstances of the statement provide sufficient indicia of reliability, and the child is unavailable as a witness, and there is corroborative evidence of the act. Although the trial judge did not make the specified findings required by the Washington statute, the hearsay accusations were not only admitted, but allowed to constitute the sole direct proof of both the corpus delicti and the defendants' criminal responsibility.

The Washington Court of Appeals reversed the defendants' convictions and ordered a new trial because, it found, the accusations were not sufficiently corroborated to meet the standards of the Washington statute.[21] The Supreme Court of Washington then reversed the Court of

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[21]The Court of Appeals' opinion is unpublished. It is described by the Washington Supreme Court, 790 P.2d 610, 614.

Appeals and reinstated the Swans' convictions, based on its conclusion that the accusations of the two girls corroborated each other sufficiently to satisfy the corroboration requirement of Washington's statute.

On habeas corpus to the United States District Court, the Swans claimed that they had been denied their constitutional right to confront their accusers. The district court held that the credibility of the reporting witness and the existence of evidence contradicting the hearsay accusations were constitutionally irrelevant for determining the reliability of the accusations, and that Rachel's inability to tell the truth or accurately remember the past did not undermine the reliability of her hearsay accusations. The Ninth Circuit affirmed, specifically declining to consider whether a defendant could constitutionally be convicted on

hearsay alone. The Swans have petitioned this court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. EVIDENCE CONTRADICTING HEARSAY ACCUSATIONS SHOULD BE CONSIDERED CONSTITUTIONALLY RELEVANT TO THE NEED FOR CONFRONTATION.

In assessing the reliability of the hearsay accusations, the Ninth Circuit felt compelled by this Court's decision in Idaho v. Wright[22] to ignore all evidence contradicting the hearsay accusations.[23] This is a gross misreading of Wright and a perversion of its purpose. Notwithstanding Wright's mandate to carefully examine the reliability of non-traditional hearsay accusations, the Ninth Circuit treated the evidence of unreliability as constitutionally

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[22]497 U.S. 805 (1990).

[23]"[C]an arguably noncorroborating evidence be used to demonstrate the unreliability of a hearsay statement? Wright's caution against reference to other evidence at trial suggests not." Swan v. Peterson, 6 F.3d 1373, 1381 (9th Cir. 1993).

irrelevant: the fact that medical evidence negates much of the physical experience which the statements describe; the fact that Conradi approached Beth Anne and initiated the sequence that resulted in the accusations by scolding the child for having her dress up and lecturing her about how no one should see or touch her private parts; the fact that Rachel's statements were in response to questions by the director in an interview held for the purpose of asking about the alleged abuse by the Swans (quite the opposite of "spontaneous"), and that the director had conferred with Conradi and thus had in mind not only the substance but the phrasing of Beth Anne's alleged statements. The Ninth Circuit saw no constitutional necessity to consider the obvious alternative explanation for the supposed precocious knowledge reflected in the reported statements, namely that the

described sexual events sprang from the adult fears, imagination, or experience of Lisa Conradi, who elicited them from Beth Anne and then reported them to the director, who then in turn "confirmed" them in her interview with suggestible Rachel.

The Ninth Circuit's refusal to consider the contradicting medical evidence when determining the reliability of the hearsay statements denied the defendants the protection due them. Wright holds that hearsay which lacks sufficient foundational guarantees of trustworthiness cannot be boot-strapped into evidence by corroborating evidence.[24] This holding is the defendant's protection. Reliability is the ultimate constitutional key. Although the trial

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[24]See also United States v. Accetturo, 966 F.2d 631, 634 (11th Cir. 1992); Ring v. Erickson, 983 F.2d 818, 821 (8th Cir. 1993).

judge may not consider other corroborating evidence to boost the level of reliability over the threshold of proof, Wright should be read to require the judge to consider noncorroborating, contradictory evidence that could prove the hearsay to be unreliable. If the court ignores noncorroborating evidence, it might admit inherently unreliable testimony, thereby defeating the main thrust of Wright. Moreover, Wright sets a standard for the admission of hearsay specifically requiring that it "be so trustworthy that adversarial testing would add little to [its] reliability." Wright, 497 U.S. at 820; see also White v. Illinois, 112 S. Ct. 736, 743 (1992). The existence of medical evidence totally inconsistent with the children's alleged hearsay statements demonstrates a clear need for adversarial testing through cross-examination, and, in the absence of cross-examination, thus

renders the hearsay statements constitutionally incompetent.

This Court should grant certiorari because the Ninth Circuit's result allows a defendant to be convicted of a crime on the basis of hearsay shown to be unreliable by other evidence, a result which diminishes the constitutional protection of the Confrontation Clause to the vanishing point.

II. THIS COURT HAS NOT CONSIDERED THE CONSTITUTIONAL IMPLICATIONS OF ADMITTING THE HEARSAY STATEMENTS OF A CHILD FOUND INCOMPETENT TO TESTIFY BECAUSE SHE DOES NOT UNDERSTAND THE OBLIGATION TO TELL THE TRUTH AND DOES NOT HAVE SUFFICIENT MEMORY TO SPEAK TRULY ABOUT PAST EVENTS.

In Idaho v. Wright, this Court recognized that if a child is too scared to speak in court, her incompetence for that reason does not necessarily mean that statements she made in earlier unpressured circumstances are unreliable. But when,

as here, a child's incompetence stems not from fear but from insufficient capacity for perception, memory, and truth telling, the child's statements -- past and present -- are presumptively unreliable.[25] Absent a showing that the child was substantively competent at the time the hearsay statements were made, such statements are inherently unreliable and their admission should be barred by the Confrontation Clause.

In this case, the trial judge conducted a full competency hearing and found that Rachel "did not understand the obligation to tell the truth" and "did not

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[25]See State v. Paster, 524 A.2d 587, 590 (R.I. 1987) ("When a trial justice has ruled a witness incompetent to testify because the justice is not convinced that the witness is capable of relating a capacity to observe, to recollect, to communicate, or to appreciate truthfulness, the justice has already made the determination that the witness's assertions are unreliable."); See also Hutchcraft v. Roberts, 809 F. Supp. 846, 851 (Kan. 1992).

have a sufficient memory to speak truly about past events."[26] Nonetheless this three year old child's hearsay statements were accepted by the courts below as crucial evidence to convict.

The competence of a declarant is the bedrock foundation for the reliability of a declarant's statement. The reliability of a statement cannot exceed the reliability of the declarant. The circumstances surrounding the making of a statement can sometimes give clues to the reliability of the declarant's statement, but if the declarant is known to be incompetent, then no amount of surrounding circumstance makes a difference. The accusation of a lunatic is, constitutionally speaking, unreliable as a basis for a criminal conviction, regardless of whether the accusation was

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[26]Washington v. Swan, 790 P.2d 610, 627 (Wash. 1990).

spontaneous or excited. Approving the admission of Rachel's hearsay statements is akin to approving the hearsay declaration of a blind person stating what he saw, or of an amnesiac stating what she remembered.

The Court should grant certiorari in order to clarify the important differences in principle between hearsay statements made by individuals incapable of speaking the truth or accurately remembering the past and those made by individuals found incompetent simply because they cannot communicate to the jury.

III. THE CONSTITUTIONAL TEST FOR ADMITTING HEARSAY ACCUSATIONS SHOULD BE UNDERSTOOD TO REQUIRE TRIAL JUDGES TO ASSESS THE CREDIBILITY OF THE PERSONS ELICITING AND REPORTING THE HEARSAY STATEMENTS.

In child abuse cases, where statements from children are often elicited by untrained individuals who may

be predisposed to find abuse[27], the reliability of these statements cannot accurately be determined without also considering the credibility of the questioner.

Where hearsay is concerned, judges should understand that they are charged directly with the duty of assessing the statement's reliability to see if its presumed unreliability is overcome. This requires the judge to determine outright that the hearsay statement was actually made, it being logically impossible to assess the reliability of a fictitious statement. The credibility of the reporter thus becomes a constituent part of the reliability of the hearsay. If the hearsay statements were tape recorded,

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[27]Indeed, several studies have shown that 40% to 80% of sex abuse allegations are false. Slicker, Child Sex Abuse: The Innocent Accused, 91 Case & Comment 12, November/December 1986.

judges would easily recognize their obligation to judge the reliability of the tape recorder as part of the foundation. Likewise, judges must assess the reliability of human "recorders" who report hearsay accusations as part of the foundation.[28]

Wright instructs trial judges to assess "the totality of the circumstances" that surround the making of a hearsay statement. Idaho v. Wright, 497 U.S. 805, 820 (1990). As to this "totality" the judge is an outright fact finder for purposes of deciding the admissibility of

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[28]This Court in Wright recognized that the credibility of a reporter is at issue by identifying the presence or absence of a tape recording of a non-traditional hearsay statement as a relevant consideration in determining its admissibility. Idaho v. Wright, 497 U.S. 805, 818-19 (1990). The existence of a tape recording of the statement eliminates questions, pertinent to admissibility, about the credibility of the reporter. See McCafferty v. South Dakota State Penitentiary, 944 F.2d 445, 452 (8th Cir. 1991).

the evidence and not merely an appraiser of whether a reasonable juror could find that the foundational requirements for admissibility are met. In this factfinding role, it is a crucial issue, deeply confusing to judges, whether they should assess the credibility of the foundation-fact witness. The approach of the Ninth Circuit sees no judicial role in evaluating the credibility of the hearsay reporter. Other courts, however, recognize that the trial judge should assess the credibility of the reporter at the foundational level. See e.g., United States v. Williams, 809 F.2d 75, 89 (1st Cir. 1986) ("Evaluation of [the witnesses'] credibility ... is within the province of the trial court for purposes of [determining whether a conspiracy exists as a foundational aspect of admitting a coconspirator's statement].")

The Ninth Circuit failed to

appreciate that the reliability of hearsay statements in child abuse cases necessarily depends on the reliability of the hearsay reporter.[29] Judges who do not understand this are confused about their function, thinking simplistically that all matters of witness credibility are for the jury. This is fundamentally wrong. It is at odds with the basic duty of judges to test evidentiary foundations. Credibility is for the jury on ultimate issues. Credibility is for the judge on questions of foundation. Cf. Daubert v. Richardson, 113 S. Ct. 2786 (1993). The Court should grant certiorari to clarify the basic

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[29]See, Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychological Bulletin No. 3, page 403, 420-22 (1993) (Analyzing studies suggesting that the prior knowledge of interviewers influences their questioning and affects children's responses. Children respond to what they think the interviewer wants them to say, and once they adopt an inaccurate story, will maintain this story under later questioning).

function of judges in assessing the foundation and sufficiency of evidence.

IV. THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW CONCERNING WHETHER A CRIMINAL DEFENDANT CAN BE CONVICTED ON THE BASIS OF HEARSAY ALONE.

This case presents the unresolved and fundamentally important question of whether the Confrontation Clause bars the conviction of an individual solely on the basis of hearsay evidence.[30] The magistrate summed up the evidence in this case as follows: "As physical or other corroborating evidence of abuse was equivocal or absent, the State's case

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[30]This issue was originally raised in an amicus brief I filed in the Ninth Circuit. The Ninth Circuit concluded that the Swans waived this argument by failing to reference it in their brief. However, the Swans ceded ten minutes of their argument time to me to address this issue on their behalf. I respectfully request that the Court not allow this technical deficiency to jeopardize the constitutional rights of the Swans. The Swans have adopted this argument on appeal to this Court. See Brief for Petitioners at 24 n.16.

against the Swans was built entirely on the hearsay statements."[31] Hearsay alone should be considered inadequate to sustain a criminal conviction beyond a reasonable doubt because, without either cross-examination or corroboration, there necessarily remains the reasonable doubt that the declarant misspoke, misstated, misremembered, or misperceived.

There is no reason to assume that once a hearsay accusation is admitted it must be deemed sufficient to convict, even if crediting the hearsay would cover all of the elements of the charged offense. Hearsay is admitted, whether pursuant to traditional or non-traditional exceptions, because the trier of fact is better able to determine the truth with than without it. Kaplow, Note, The Theoretical

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[31]Magistrate's report and recommendation, Brief for Petitioner at App. A - 13. See also, Swan v. Peterson, 6 F.3d 1373, 1377 (9th Cir. 1993).

Foundation of the Hearsay Rules, 93 Harv. L. Rev. 1786 (1980). But this does not mean that the hearsay is as solid a basis for conviction as cross-examined evidence. The hearsay, even after admission, still carries the deficiency that it has not been tested by cross-examination. Wigmore's oft-quoted assertion that hearsay is sometimes so trustworthy as to render cross-examination superfluous is actually quite silly and should not be seen as a description of actual trial realities. No one really believes, for example, that excited utterances, contemporaneous statements, or dying declarations are ipso facto so trustworthy that "cross examination of the declarant would be an act of supererogation."[32] If

[32]See Hutchins & Slesinger, Some Observations on the Law of Evidence, 28 Colum. L. Rev. 432 (1928); Goldman, Distorted Vision: Spontaneous Exclamations as a "Firmly Rooted" Exception to the Hearsay Rule, 23 Loy. L. Rev. 453 (1990).

hearsay is the sole evidence of guilt, then the essential process value of the Confrontation Clause, namely allowing the defendant to test the case against him, is defeated.

Confrontation should be conceived as insuring that the defendant has the opportunity to test the strength of the case against him taken as a whole. Such an approach would recognize on one hand that hearsay is often strong enough evidence to justify its admissibility, and on the other hand, that it is inherently deficient as a sole basis for reaching a conclusion beyond a reasonable doubt. This approach would require a threshold foundation of reliability to justify admission of hearsay, just as Justice O'Connor articulates in Wright, but would also require that if hearsay is admitted, it must be corroborated to be deemed sufficient to convict. See Wright, 497

U.S. at 834 (Kennedy, J. dissenting) (recognizing that corroboration is essential to a defendant's right to test the case against him).

This Court has already recognized a category of statements which are admissible but nonetheless deficient to prove what they assert because, without more, doubt remains as to the statement's reliability. Confessions, for example, cannot provide the sole basis for conviction. Opper v. United States, 348 U.S. 84, 91 (1954). Before a jury can decide the guilt or innocence of a defendant, the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the [confession]." Id. at 93; see also United States v. Leavitt, 608 F.2d 1290, 1292 (9th Cir. 1979 (defendant's admission cannot constitute the sole proof of corpus delicti).

Furthermore, the requirement that an anonymous tip be corroborated to establish probable cause involves a similar relationship between admissibility and sufficiency at a different level of evidentiary reliability and certainty of proof. Illinois v. Gates, 462 U.S. 213 (1983).

The Sixth Circuit has specifically recognized that hearsay alone cannot establish guilt beyond a reasonable doubt:

> [W]hen [hearsay] is the only source of support for the central allegations of the charge . . . we do not believe that a substantial factual basis as to each element of the crime providing support for a conclusion of guilt beyond a reasonable doubt has been offered by the Government.

United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979). While Judge Easterbrook, writing for the Seventh Circuit *en banc*, recognized the sufficiency question as

open,[33] at least three Seventh Circuit Judges concluded that hearsay alone is insufficient to support a conviction. United States v. Ortiz, 907 F.2d 629, 636 (7th Cir. 1990) (opinion of Chief Judge Bauer).

The Swans have been convicted solely on the basis of extremely thin hearsay, unsworn, unrecorded, uncrossexamined, uncorroborated, unconfronted, uttered by incompetent declarants, and reported by biased witnesses. The Court should grant certiorari and address whether such hearsay evidence can be the sole basis for reaching a conclusion beyond a reasonable doubt.

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[33] "If evidence is both admissible and relevant, there is of course a third question: whether it is sufficient to support a verdict. Nothing we say in this opinion addresses the question whether hearsay alone is sufficient to support a verdict of guilt." United States v. Ortiz, 907 F.2d 629, 632 (7th Cir. 1990).

CONCLUSION

For the foregoing reasons, the Court should grant the Swans' petition for certiorari.

Respectfully submitted,

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[34]Thanks to Steven Glaser and David Becker, students at Harvard Law School, for assistance in preparing this amicus petition.